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NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

CAREY CANADA, INC.
Petitioner

VS:

JAMES E. HINELY, ET AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

(1) Whether, in an asbestos products liability case, sanctions for failure to make discovery of documents under a request for production relating to jurisdictional and sales issues are violative of due process of law when the

sanctions exceed the scope of discovery sought and adjudicate issues such as a finding that (a) Defendant failed to warn plaintiffs of the dangers of asbestos-containing products (b) Defendant is guilty of negligence per se (c) Defendant knowingly suppressed knowledge of the dangers of asbestos in order to maximize corporate profit in disregard of adverse health effects upon persons exposed to such products?

(2) Whether the trial court denied defendant Canadian corporation due process of law by imposing sanctions of default and contempt for non-production of documents which defendant was unable to produce because prohibited from doing so by the law of Canada?

PARTIES

The Petitioner, defendant in the trial court below, is Carey Canada, Inc.,

a Canadian corporation, (hereinafter Carey Canada). The named Respondent, plaintiff below, is James E. Hinely. This case, in all courts below, actually involved twenty-six (26) similar cases involving twenty-six (26) different groups of plaintiffs.[1]

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1. In the trial court, the cases were treated as having been consolidated for purposes of all pretrial rulings.

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OPINIONS BELOW

The order of the State Court of Chatham County adjudging defendant in contempt and imposing sanctions is unreported (R. 580).* The decision of the Court of Appeals of Georgia, the intermediate appellate court, is reported as Carey Canada, Inc. v. Hinely et al, 181 Ga. App. 364, 352 S.E.2d 398 (1986). (Appendix, p. 1). The decision of the Supreme Court of Georgia is reported as Carey Canada, Inc. v. Hinely, et al, 257 Ga. 150, 356 S.E.2d 202 (1987). (Appendix, p. 42).

JURISDICTION

Jurisdiction is based on 28 USCA 1257(3), defendant having set up in the courts below, a right, privilege and immunity with respect to the sanctions

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* References to the record refer to the record transmitted to the Court of Appeals of Georgia.

imposed, under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The order of the trial court was entered December 31, 1984 (R. 584). Notice of Appeal was timely filed on January 29, 1985 (R. 1). The decision of the Court of Appeals of Georgia was rendered November 20, 1986, rehearing denied December 19, 1986. The decision of the Supreme Court of Georgia was rendered May 27, 1987, rehearing denied June 17, 1987.

STATUTORY AND CONSTITUTIONAL PROVISIONS RELIED UPON

(a) STATUTE INVOLVED

O.C.G.A. §9-11-37(b), in pertinent part provides:

> "If a party . . . fails to obey an order to provide or permit discovery. . . the Court in which the action is pending may make such orders in regard to the failure as are just and, among others, the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders, or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;. . ."

(b) CONSTITUTIONAL PROVISION RELIED UPON

Fourteenth Amendment to the Constitution of the United States:

". . . Nor shall any State deprive any person of life, liberty or property, without due process of law. . ."

STATEMENT OF THE CASE

On May 30, 1980, James E. Hinely filed Civil Action No. 80-3141 in the State Court of Chatham County, Georgia, against 22 defendants, including Petitioner Carey Canada, claiming that plaintiff was a carpenter who became exposed to asbestos products either mined or manufactured by defendants, resulting in injuries. The complaint asserted 4 causes of action based on negligence, implied warranty, knowledge and conspiracy to deprive, and strict liability in tort (R. 17-21). Defendant Carey Canada filed defensive pleadings denying the essential allegations of the complaint (R. 24). Susequently thereto, the 25 other asbestos products liability cases referred to in the contempt order

were filed in which Carey Canada was named as a defendant.

Interrogatories, Requests for Admission and Requests For Production of Documents were filed by plaintiffs, the latter, which are the only thing in issue here, having been filed on December 21, 1982 (R. 262; Appendix, p. 46). Defendant Carey Canada filed objections, including the objection that production would be contrary to the Canadian Business Concerns Records Act of 1964, which governed defendant as a Canadian Corporation whose corporate offices were located in Canada (R. 272).

The objections were overruled on November 16, 1983, and defendant was ordered to respond by December 9, 1983. After defendant had exhausted a number of proceedings challenging the order in the state superior court and appellate

courts, and the filing of a further response by defendant stating that certain documents would be produced (R. 573), the State Court entered its order of sanctions on December 31, 1984 which:

(1) Imposed a fine of $500 per day from the date of the order requiring discovery (Dec. 9, 1983) until the date of the sanctions order, or $193,500;

(2) Relying on O.C.G.A. §9-11-37(b), ordered as follows:

> "1. The following facts, matters and condition (sic) established as true for purposes of the above-referenced lawsuit:
>
> (a) That Defendant Carey Canada, Inc. did sell asbestos containing products;
>
> (b) That Plaintiffs were exposed to the asbestos containing products sold by Defendant Carey Canada, Inc.;
>
> (c) That Plaintiffs have suffered personal injury and/or death as a result of being exposed to the asbestos containing products sold by Defendant Carey Canada, Inc.;

(d) That the Defendant Carey Canada, Inc., failed to warn the Plaintiffs and each of them of the dangerous characteristics of their asbestos-containing products and is, therefore, guilty of negligence as a matter of law;

(e) That the Defendant Carey Canada, Inc. knowingly suppressed and covered up knowledge of the dangers of asbestos in order to maximize corporate profits in complete and utter disregard of the adverse health effects upon persons exposed to asbestos products manufactured and sold by Defendant Carey Canada, Inc.;

2. That Defendant Carey Canada, Inc. is prohibited from submitting or offering any evidence or testimony to contradict any facts alleged by Plaintiffs or to support any defenses alleged by Defendant Carey Canada on any issues of liability." (R. 584)

On appeal, the Court of Appeals of Georgia rejected defendant's contention that the contempt fine was criminal contempt and hence in excess of the statutory maximum of $500 per violation.

Second, the Court further recognized the general principle, both as a matter of statutory construction and due process, that a sanction "must be specifically related to the particular claim which was at issue in order to provide discovery", citing Insurance Corporation of Ireland v. Compagnie Des Bauxites de Guinea, 456 U.S. 694, 707, 72 L.Ed.2d 492 (1982), and that the sanction must "support the presumption that the refusal to produce evidence. . . was but an admission of the want of merit in the asserted defense", citing Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351, 53 L.Ed. 530 (1909) (181 Ga. App. at 368-369). Based on this, the Court of Appeals held that sanction 1(c) was error as it did not "correlate with any documents requested", and that Sanction 2, insofar as it precluded defendant from contesting any

issue of liability, was also "beyond the scope of the discovery requested" (181 Ga. App. at 369). The Court of Appeals also rejected defendant's Fourteenth Amendment due process claim that it was improperly sanctioned for refusing to do what the law of its sovereign forbade it to do. (181 Ga. App. at 373).

The Supreme Court of Georgia granted certiorari, and set aside the contempt fine, but did not consider or disturb the other holdings of the Court of Appeals. 257 Ga. 150; Appendix, p. 42.

FEDERAL QUESTIONS RAISED

In the trial court below, defendant resisted all sanctions on the ground that it was not in default (R. 554, 567). In Plaintiffs' Brief in Support of their Motion For Sanctions, plaintiffs conceded that any sanction imposed could not

exceed the scope of the discovery sought, declaring that the sanctions authorized by Georgia law (O.C.G.A. §9-11-37[b][2]) "[M]ay only relate to the matters and issues on which discovery is being frustrated", citing Agnor on Discovery, §12-7. (R. 482). However, the trial judge's order disregarded this admission by plaintiffs and imposed the sanctions complained of, going far beyond what was authorized by law, or what plaintiffs conceded was proper. Defendant thereupon raised its due process question at the earliest practical time, by enumeration of errors on appeal to the Court of Appeals (Enumeration Nos. 9, 13).

In defendant's objections to plaintiffs' Requests for Production, defendant also urged that the Request was "in contravention of the Province of Quebec's Business Concerns Records Act,

1964, Que. Rev. Stat. C. 278 (1964) and expose the Defendant to liability for contempt for violation of the Act" (R. 277, 278). When the trial court rejected these objections and imposed sanctions going beyond anything reasonably anticipated,defendant at the first opportunity asserted its due process constitutional objection in its Enumeration of Errors in the Court of Appeals of Georgia.[2]

The Court of Appeals decided the due process federal questions by rejecting same (181 Ga. App. at 373, Divisions 7 and 9). The Supreme Court of Georgia, whose review of decisions of the Court of Appeals is discretionary, Constitution of Georgia; Art. VI, Sec. VI, Par. V, granted certiorari stating that it was

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2. Enumeration Nos. 9, 13.

particularly concerned only with the criminal contempt fine (Order of February 25, 1987), and the Court in fact addressed only this issue. 257 Ga. 150.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

(1) Imposition of Discovery Sanctions Unrelated To The Discovery Sought Violates Due Process And Is Contrary To Prior Decisions Of This Court

The due process challenge rejected by the Court of Appeals of Georgia below is one previously addressed by this Court in Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215 (1897); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L.Ed.2d 530 (1909); Societe Internationale v. Rogers, 357 U.S. 197, 209, 2 L.Ed2d 1255 (1958), and Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea, 456 U.S. 694, 705, 72 L.Ed.2d 492 (1982).

Hovey v. Elliott held that it was a denial of due process for a Court to strike a party's answer and declare him in default as punishment for contempt in failing to obey a prior order of court, for "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." (167 U.S. at 414). Hammond Packing Company v. Arkansas, supra, modified Hovey by upholding an adjudication of default and the imposition of penalties sought by the

complaint when the defendant had refused to submit to depositions and produce records relating to all issues, including liability. Hovey was distinguished on the reasoning that:

> "In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by

not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law." (212 U.S. at 351).

In Societe Internationale, supra, dealing with Rule 37, FRCP, on which the Georgia statute is based, the Court, in holding that the district court had erred in dismissing a complaint by a foreign corporation seeking to recover property seized under the Trading With The Enemy Act, based upon its refusal to produce documents, declared that "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v Elliott, 167 US 409, . . . and Hammond Packing Co. v. Arkansas, 212 US 322,...

These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 USC (1952 ed.), p. 4325." (357 U.S. at 209). Insurance Company of Ireland, supra, upheld application of Rule 37(b)(2) to the establishment of jurisdictional facts where the defendants had refused to produce business records bearing on the jurisdictional question, declaring that the "application of a legal presumption to the issue of personal jurisdiction does not itself violate the Due Process Clause. . ." (456 U.S. at 709). The Court recognized

the due process implications of adjudging facts as established when there was no connection between the discovery sought and the facts found, referring to Hovey, Hammond and Societe Internationle and the proposition that "Due Process is violated only if the behavior of the defendant will not support the Hammond Packing presumption" (456 U.S. at 705-706). The Court further concluded that "a proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption" (Id., p. 706), and that "Rule 37(b)(2) contains two standards--one general and one specific-- that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule

of Hammond Packing, supra, the former represents the general due process restrictions on the court's discretion." (456 U.S. at 707).

These rules have uniformly been followed by the authorities. United States v. Meyer, 398 F2d 66, 77 (9th Cir. 1968); O'Toole v. William J. Meyer Co., 243 F2d 765 (5th Cir. 1957); Gipson Lumber Co. v. Schickling, 56 Wis. 2d 164, 201 N.W. 2d 500 (1972); Sears Roebuck & Co. v. Walker, 127 Ariz. 432, 621 P2 938, 942 (1980); Feingold v. Walworth Bros., 144 N.E. 675, 238 N.Y. 446 (1924); Harrigan v. Mason & Winograd, Inc., 397 A2d 514, 517, 121 R.I. 209 (1979); Schulze v. Coy Kendall, 545 P2d 392, 397, 218 Kan. 653 (1976); English v. 21st Phoenix Corp., 590 F2d 723 (8th Cir. 1979), cert. den. 444 U.S. 832 (1979); Agnor, Use of Discovery Under The Georgia

CPA, §12-7, p. 265 (3rd Ed.); 27 CJS 268-269, §86; 35A CJS 1048, §750; 4A Moore's Fed. Prac., §37.03 (2-3); Logan v. Zimmerman Brush Co., 455 U.S. 422, 429, 71 L.Ed.2d 265 (1982); Emerick v. Fenick Industries, 539 F2d 1379 (5th Cir. 1976); Roadway Express Inc. v. Piper, 447 U.S. 752, n. 14, 65 L.Ed.2d 488 (1980); Dorsey v. Academy Moving & Storage, 423 F2d 858, 860 (5th Cir. 1980); In re Rubin, 769 F2d 611 (9th Cir. 1985); Wyle v. R. J. Reynolds Industries, Inc., 709 F2d 585 (9th Cir. 1983); Munoz-Santana v. U.S. Immigration and Nationalization Service, 742 F2d 561 (9th Cir. 1984); Professional Seminar Consultants v. Sino American Technology, 727 F2d 1470 (9th Cir. 1984); Fjelstad v. American Honda Motor Co., 762 F2d 1334 (9th Cir. 1985).

In this case, the refusal of defendant does not support the sanctions

imposed. In their Motion To Compel, plaintiffs characterized the scope of the Requests For Production as being related to sales, solicitation, and "relevant jurisdictional evidence" (R. 327).[3]

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3. The requests for production relate to these matters: Records retrievable system for sales (No. 1); names and addresses of Georgia purchasers (Nos. 2, 3), and companies to whom defendant sent mailings (No. 4); ledgers, journals, etc., relating to Georgia companies making payments to Carey Canada for asbestos products (No. 5); information as to orders or requests to purchase from Georgia customers (No. 6); information as to shipments into Georgia of products (No. 7); information as to shipments of asbestos products to any persons anywhere after July, 1970 (No. 8); information as to invoices for sales both in Georgia and elsewhere (Nos. 9, 10); travel expense records for travel by officials to Georgia (Nos. 11, 12, and 13); records relative to participation by Carey Canada in any meetings or conventions in Georgia (No. 14); directories maintained by defendant (No. 15); employee lists and adddresses of company employees (No. 16); records of telephone calls to Georgia (No. 17); and records relating to advertisements placed by defendant in any

Yet, the sanctions in question are not related at all to the Requests. Sanction 1(d) first establishes that defendant failed to warn plaintiffs of the dangerous characteristics of asbestos products. While advertising matter may have failed to disclose any warnings, the more pertinent aspect is the unsupported assumption that defendant knew of the dangers of asbestos, and none of the Requests sought this type of evidence at all. The second part of sanction 1(d) is even more remote, for it adjudicated that defendant "is therefore guilty of negligence as a matter of law" (R. 584). None of the Requests dealt with liability, as the Court of Appeals itself

(Footnote 3 continued. . .
publication (No. 18). (R. 262).
Appendix, p. 46. In plaintiffs' motion to compel, referred to above, plaintiffs grouped and characterized the Requests substantially the same as set forth in this note.

recognized with respect to Sanctions 1(c) and (2) (181 Ga. App. at 369), and this sanction is even more far-fetched because under Georgia law, ". . .[T]he conduct of a party cannot be declared to be negligence per se unless it has been so declared by a lawmaking body." Ford Motor Co. v. Carter, 239 Ga. 657, 662, 238 S.E.2d 361 (1977); Garrett v. Royal Bros. Co., 225 Ga. 533, 170 S.E. 2d 294 (1969). No statute or other law declares that failure to warn is negligence or otherwise illegal. This is a jury question under the facts of each case for the jury to resolve. Massey v. Hilton Heights Park, Inc., 121 Ga. App. 214, 217-219, 173 S.E.2d 396 (1970).

Sanction 1(e), that defendant "knowingly suppressed and covered up the dangers of asbestos in order to maximize corporate profits in complete and utter

disregard of the adverse health effects upon persons exposed. . ." (R. 584), assumes (1) That defendant knowingly suppressed, etc., (2) In disregard of health effects, (3) For the purpose of maximizing corporate profits (R. 584). None of the documents sought related to company or other documents showing tht defendant had knowledge during the period in question that asbestos was dangerous. The Requests did not seek discovery of chemical test results, inter-company memos ordering that such information not be divulged, nor any company records stating that information had to be suppressed in order to avoid a reduction in sales and corresponding reduction in profits. The sanction here presumes not only a deliberate act, and technical knowledge, but also a specific state of

mind, and none of this is supported by any documents sought by the Requests.

The proposition here is similar to the due process rule governing a statutory presumption, under which "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." Tot v. United States, 319 U.S. 463, 467, 87 L.Ed. 1519 (1943). "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." Bailey v. Alabama, 219

U.S. 219, 239, 55 L.Ed 191, 200 (1911); Speiser v. Randall, 357 U.S. 513, 526, 2 L.Ed.2d 1460 (1958). The adjudication of facts against a party to a case without any evidence or lawful presumption arising from a default from which an evidentiary inference logically can be derived, strikes at the very heart of due process. "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." (Argument of Daniel Webster in Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 581, 4 L.Ed. 629 [1819]).

The Section 37(b)(2) finding here is inexplicable in the face of the Court of Appeals' holding that a declaration of liability could not be supported. See 181 Ga. App. at 369. One Count of the complaint asserted as a separate cause of action, "knowledge and conspiracy to deprive" (R. 17-21). Consequently, plaintiffs may attempt to use this adjudication not only as an adjudication of liability, but also as a basis for punitive damages in 26 asbestos products liability cases. Plaintiffs also may attempt to use it as an admission or estoppel in other similar cases for the proposition that Carey Canada has been found guilty of knowingly suppressing the harmful effects of asbestos, for the express purpose of increasing corporate profits "in complete and utter disregard of the adverse health effects upon

persons exposed to asbestos products . . ." (R. 584). Yet there has been no trial and no evidence to this effect, only a judicial edict unsupported by anything except a presumption having no valid basis whatever.

(2) Petitioner Carey Canada, As A Canadian Corporation, Was Denied Due Process Of Law By The Adjudication Of Default And Contempt For Failing To Produce Records Which It Was Unable To Produce Because Of Prohibition of Canadian Law.

Petitioner, as a Canadian Corporation, objected to the Request For Production of Documents on grounds that production was prohibited by the law of Canada, specifically, the Province of Quebec Business Concerns Records Act (R. 273), which declares:

> "2. Subject to section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside the

> Province, remove or cause to be removed, or send or cause to be sent, from any place in the Province to a place outside the Province, any document or resume or digest of any document relating to any concern." (R. 282).[4]

Section 3 makes exceptions for situations where documents are sent to a

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4. Respondents urged below that since documents were found to be in the United States, petitioner could not be heard to urge the Canadian law as a defense. However, the order of production and the sanctions order were not limited to documents in the United States (R. 370, 581). Indeed, Petitioner had agreed with Respondents to make those documents available, but Respondents, apparently anticipating a favorable order on the sanctions motion, notified Petitioner that they would not proceed with the agreed on inspection, but would rest on their motion so as not to "waive any rights" (R. 608). Subsequently, the documents were furnished to plaintiffs' co-counsel. The trial judge also was incorrect in stating in the contempt order that defendant had not disclosed the existence of the records in the United States. This was not correct, as the Court was advised in a letter, and a disclosure also had been made at a hearing.

branch or affiliate outside the Province in the ordinary course of business (R. 282); Section 4 authorizes the Attorney General to apply for injunction to prevent removal of records (R. 283); and Section 5 provides criminal penalties (R. 283-4). Provision is made by a separate act for examination of witnesses and production of documents in Canada pursuant to Court order (R. 285). A copy of the order of a Canadian Court, dated July 21, 1982, responding to an order in South Carolina litigation affecting Petitioner was also submitted, enjoining petitioner from removing or sending out any documents (R. 295), as well as an affidavit of defendant's Florida counsel testifying to the events in the Canadian Court on the application brought by the Attorney General, in which he stated "I was told that if Carey Canada, Inc.

allowed the inspection to take place, the officers and directors of Carey Canada would be fined and/or jailed if they allowed the inspection to take place" (R. 297).

The trial court overruled these objections (R. 370) and subsequently held petitioner in contempt, fining it $193,500, and imposing the sanctions under Section 37 of the Georgia Civil Practice Act previously challenged in Part 1 hereof (R. 584). These rulings were enumerated as error on due process grounds (Enumeration Nos. 1, 2, 9, 10, 11), and rejected by the Court of Appeals. (181 Ga. App. at 373). In dealing with this very question in Societe Internationale v. Rogers, 357 U.S. 197, 210, 2 L.Ed.2d 1255 (1958), in a case where the plaintiffs' complaint for recovery of property under the

Trading With The Enemy Act was dismissed for refusal to make production contrary to the law of Switzerland, this Court held:

> "These two decisions (Hovey v. Elliott and Hammond Packing Co.) leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the Hammond Case might well falter under such circumstances. Cf. Tot v United States, 319 US 463, 87 L ed 1519, 63 S Ct 1241. Certainly substantial constitutional questions are provoked by such action."

In Societe, the Court held that it was not error to overrule the foreign law objection in that case, dealing with a public law question, since the question more properly could be resolved on motion for sanctions, and of course, in Societe, the sanctions were set aside: ". . . [W]e think that Rule 37 should not be

construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." (357 U.S. at 212). Even so, the Court recognized that a different rule might also apply at the objection stage in cases not involving laws having strong public interest implications:

> "We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order." (357 U.S. at 205).

These due process limitations have been referred to in other cases. See Roadway Express Inc. v. Piper, 447 U.S. 752, n. 14, 65 L.Ed.2d 488 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 429, 71 L.Ed.2d 265 (1982); Emerick v. Fenick Industries, 539 F2d 1379 (5th Cir. 1976); Harrigan v. Mason & Winograd, Inc., 121 R.I. 215, 397 A2d 514, 517 (1979); Sears Roebuck & Co. v. Walker, 127 Ariz. 432, 621 P2d 938, 942 (1980).

Other cases have followed Societe, as a matter of interpretation of the Federal Discovery Rules, and refused to impose sanctions where a party's production of records would subject it to the penal laws of its country of origin, without necessarily invoking due process considerations. In Re Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F2d 922, 997 (10th Cir.

1977); In re Oil Spill by Amoco Cadez, 93 F.R.D. 840 (D.C. Ill. 1982); Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super 716, 475 A2d 686 (1984); Federal Maritime Commission v. Desmedt, 366 F2d 464, 467 (2nd Cir. 1966); Cine Forty-Second Street Theatre v. United Artists, 602 F2d 1062, 1066 (2nd Cir. 1979); Volkswagenwerk A. v. Superior Court, 123 Cal. App. 3rd 840, 176 Cal. 874 (1981); Application of Chase Manhattan Bank, 297 F2d 611 (2nd Cir. 1962); First National Bank v. IRS, 271 F2d 616, 619 (2nd Cir. 1959), cert. den. 361 U.S. 948 (1960); In the Matter of Equitable Plan Co., 185 F. Supp. 57 (D.C. N.Y. 1960), mod. sub nom. Ings v. Ferguson, 282 F2d 149, 152 (2nd Cir. 1960); United States v. First National City Bank, 396 F2d 894 (2nd Cir. 1968);

Trade Development Bank v. Continental Ins. Co., 469 F2d 35 (2nd Cir. 1972).

Independently of other considerations, a Court of the United States should not, as a matter of international law and comity, order a party to violate the law of his country. Ings v. Ferguson, supra (282 F2d 149, 152-3); Application of Chase Manhattan Bank, supra (297 F2d at 613); United States v. First National Bank, supra (396 F2d at 902); Volkswagenwerk, A. v. Superior Court, supra (123 Cal. App. 3rd at 881); Note, "Ordering Production of Documents From Abroad In Violation of Foreign Law", 31 U. Chi. L.R. 791, 792 (1964). "The cases exhibit general agreement that it is improper for a United States Court to order disclosure that would violate foreign law." Note, "Limitations On The Federal Judicial

Power To Compel Acts Violating Foreign Law", 63 Col. L.R. 1443, 1464 (1963). "From the many protests against the attempts of United States courts to secure documents which are located abroad, one thing seems quite clear: every foreign government considers this attempt as an infringement upon sovereignty and as beyond the jurisdiction of the United States according to international law". Onkelinx, Conflict of International Jursidiction: Ordering The Production of Documents In Violation of the Law of the Situs", 64 N.W.U.L.R. 487, 499 (1969).

Such orders as entered below have always engendered international controversies. FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F2d 1300, 1325 (D.C. Cir. 1980). "International Law is part of our law,

and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Pacquete Habana, 175 U.S. 677, 700, 44 L.Ed. 320, 328 (1900).

Less drastic alternatives to sanctions should be resorted to. Shelton v. Tucker, 364 U.S. 479, 481, 5 L.Ed.2d 231 (1960); Gordon v. FTC, 427 F2d 578 (D.C. Cir. 1970); Vonderheyt v. Rogers, 251 F2d 17 (D.C. Cir. 1958); Serwitz v. General Electric Credit Corp., 174 Ga. App. 747, 749, 331 S.E.2d 95 (1985); Note, "Standards for Imposition of Discovery Sanctions", 27 Maine L.R. 247, 265 (1975). The Court might order the party to apply to the Courts of his country for leave to produce the documents. Motorship Lines Ltd. v. Federal Maritime Board, 295 F2d 147, 156

(D.C. Cir. 1961); Trade Development Bank v. Continental Ins. Co., 469 F2d 35, 40-41 (2nd Cir. 1972); United States v. Standard Oil Co. of New Jersey, 23 FRD 1, 4 (D.C. N.Y. 1958); In re Grand Jury Subpoena to Continental Illinois National Bank, 96 A2d 480, 464 N.Y.S. 2d 792 (1983); United States v. First National Bank of Chicago, 699 F2d 341 (7th Cir. 1983); Note, "Foreign Nondisclosure Laws and Domestic Discovery Orders In Antitrust Litigation", 88 Yale L.J. 612, 626 (1979); Note, "Ordering Production of Documents From Abroad In Violation of Foreign Law", 31 U. Chi. L.R. 791, 801 (1964). Another alternative would be to apply the balancing test of the Restatement (Second) of the Foreign Relations Law of the United States, §40. Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson, 636 F2d

1300, 1326 (D.C. Cir. 1980); United States v. Vetco, Inc., 691 F2d 1281, 1288 ((9th Cir. 1981); "Foreign Nondisclosure Laws and Domestic Discovery Orders In Antitrust Litigation", 88 Yale L.J. 612, 619 (1979); Onkelinx, supra (64 N.W.U. L.R. 487 at 501); United States v. First National City Bank, supra, or, the Court below could have entered an order limited to a finding of the specific facts to which the Request For Production was directed.

Resort to the Hague Convention would be appropriate with respect to countries which have signed that agreement. See Societe Nationale v. U.S. District Court, 482 U.S. ____, 96 L.Ed.2d 461 (1987). (Canada has not). Conviction of contempt and imposition of sanctions under the discovery laws clearly raises due process implications. "Just as 'conviction upon

a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt." Thompson v. Louisville, 362 U.S. 199, 206, 4 L.Ed.2d 654 (1960); Garner v. Louisiana, 368 U.S. 157, 163, 7 L.Ed.2d 207 (1961); Vachon v. New Hampshire, 414 U.S. 478, 480, 38 L.Ed.2d 666 (1974). Substantive due process protects the citizen as well as procedural due process. Harrah Independent School District v. Martin, 440 U.S. 194, 197, 59 L.Ed.2d 248 (1979); Regents of University of Michigan v. Ewing, 474 U.S. ___, 88 L.Ed.2d 523 (1985). Condemnation because of circumstances beyond the control of a person has been held to deny equal protection. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-6, 31 L.Ed.2d 768 (1972); Levy v. Louisiana,

391 U.S. 68, 72, 20 L.Ed.2d 436 (1968). That same proposition was recognized in Societe Internationale, quoted above, supra (357 U.S. at 210), the Court declaring:

> "In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." (357 U.S. at 212).

CONCLUSION

Both issues presented here, that the scope of discovery sanctions should be germane to the discovery sought, and that a party should not be sanctioned for refusing to produce what he is unable to produce by the law of his origin and

citizenship, are most often addressed by this Court in construing the Federal Rules of Civil Procedure and applying rules of federal common and international law. In this case, however, the sanctions were imposed by a state court, and this fact compels an adjudication on due process grounds. Because of the importance of the questions, they should be resolved definitively by this Court. The Court specifically declined to consider the constitutional issue in Societe, preferring instead to resolve it on the basis of federal rules interpretation (357 U.S. at 212). In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 49 L.Ed.2d 747 (1976), however, there is dicta supporting a punitive approach which seems contrary to the doctrines of Hovey and Hammond Packing Co., a fact which has

created some confusion. See 8 Wright & Miller, Federal Practice and Procedure, §2284 (Supp.) and some criticism, see Note, The Emerging Deterrence Orientation In The Imposition of Discovery Sanctions. 91 Harv. L.R. 1033 (1978). The decision below will have an immediate effect upon the outcome of these 26 cases by the default adjudication of such liability and punitive damage issues as knowing suppression, concealment, and failure to warn. Equally, if not more significant, however, is the potential precedential impact on many other asbestos products liability cases throughout the United States. The petition for certiorari should be granted.

Respectfully Submitted,

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(3) Plaintiff's Requests For Production

(1) Decision Of The Court of Appeals of Georgia - Carey Canada, Inc. v. Hinely, et al, No. 72278-72303, 181 Ga. App. 364, 352 S.E.2d 398 (1987)

POPE, Judge.

Defendant Carey Canada, Inc. brings these 26 appeals (f.n. 1, list of cases, omitted) from an order entered in each case imposing sanctions pursuant to OCGA §9-11-37(b). As the issues raised in these appeals are the same, we have consolidated them for the purpose of review.

On May 30, 1980 plaintiffs brought the first of these 26 actions for asbestos products liability against defendant and others in the State Court of Chatham County. These cases were consolidated for the purpose of discovery, and special discovery

procedures were established by order dated July 23, 1982. The trial court directed that because of the special nature of asbestos litigation, the July 23 order "shall be deemed to be an order compelling discovery." On December 21, 1982 plaintiffs sought the production of certain company records or documents from defendant. On January 11, 1983 defendant objected to this request on a variety of grounds, including the constraints of the Province of Quebec's Business Concerns Records Act, Que. Rev. Stat. c. 278 (1964). This act provides that business concerns in Quebec (such as defendant) may not send business-related documents outside the province, subject to certain exceptions. On February 8, 1983 plaintiffs filed a motion to compel the production of documents; this motion was also opposed by defendant on the basis of

the Business Concerns Records Act. On April 8, 1983 plaintiffs filed a motion for letters rogatory (see OCGA §9-11-28(b)) which, as counsel for all parties agreed, could be utilized to legally circumvent the obstacles posed by the Business Concerns Records Act. On August 5, 1983 the trial court ordered its clerk to issue letters rogatory to the appropriate authority in Canada. This order was objected to by defendant and, following a hearing on the matter, appears to have been abandoned. On November 17, 1983, after notice and hearing, the trial court overruled all of defendant's objections to production of documents and directed defendant to produce said documents no later than December 9, 1983. Defendant then instituted a variety of legal maneuvers in an unsuccessful attempt to obtain

relief from or interlocutory review of the November 17 order. On October 3, 1984 plaintiffs moved for the imposition of sanctions pursuant to OCGA § 9-11-37(b). A hearing on this motion was held on October 22, 1984 and on December 31, 1984 the trial court entered the order here appealed.

1. Defendant's fifteenth enumeration cites as error the entry of the December 31, 1984 order because the judge who made the order, Hon. James W. Head, had taken the oath of office as judge of the Chatham County Superior Court on December 27, 1984. The record discloses that Judge Head was elected as judge of the superior court for a term beginning January 1, 1985 and that he resigned as judge of the state court effective on that date. We are aware of no constitutional or statutory bar to

Judge Head's continuing to serve as judge of the state court until the effective date of his resignation from that office, notwithstanding his having taken the oath of office of judge of the superior court a few days before his term of office was to begin. See Ga. Const. 1983, Art. VI, Sec. VII, Par. I; OCGA § 15-6-6. It follows that Judge Head was authorized to enter the subject order on December 31, 1984.

2. Defendant's first and eighth enumerations attack plaintiff's request for production of documents as "too broad." The trial court found that the documents sought by plaintiffs were "relevant and necessary to the discovery process calculated to lead to the discovery of admissible evidence in the litigation which is complicated, which involves multiple parties with various

business relationships in mining, producing, manufacturing, and distributing products containing asbestos."

Discovery is "an integral and necessary element of our civil practice. Wide latitude is given to make complete discovery possible. The broad purpose of the discovery rules, under the Civil Practice Act, is to enable the parties to prepare for trial so that each party will know the issues and be fully prepared on the facts. Discovery is specifically designed to fulfill a two-fold purpose: issue formulation and factual revelation. The use of the discovery process has been held to be broadly construed. [Cits]" Travis Meat, etc., Co. v. Ashworth, 127 Ga. App. 284, 285-86, 193 S.E.2d 166 (1972). "There is no territorial limitation in our discovery statutes as

to location of witnesses, documents, assets, etc. [Cits]" Thrift v. Vi-Vin Prods., 134 Ga. App. 717, 718, 215 S.Ed.2d 709 (1975). "Discovery is available under the CPA to any party in any court regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action; it is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discover of admissible evidence. [Cit.]" Morton v. Gardner, 242 Ga. 852, 857, 252 S.Ed.2d 413 (1979).

"Good cause for the issuance of a protective order designed to frustrate discovery must be clearly demonstrated. [OCGA § 9-11-26(c).] Such cause necessarily is not established by

stereotyped or conclusional statements, bereft of facts. The trial court does have a wide discretion in the entering of orders permitting or preventing the use of . . . discovery which [is] oppressive, unreasonable, unduly burdensome or expensive, harassing, harsh, insulting, annoying, embarrassing, incriminating or directed to wholly irrelevant and immaterial or privileged matters, or as to matter concerning which full information is already at hand. [Cit.]" Young v. Jones, 149 Ga. App. 819, 824, 256 S.Ed.2d 58 (1979). See Sorrells v. Cole, 111 Ga. App. 136(2a), 141 S.Ed.2d 193 (1965). "It is contemplated that the trial [court] will exercise a sound and legal discretion in the grant or denial of protective orders. Such are intended to be protective--not prohibitive--and, until such time as the court is satisfied

by substantial evidence that bad faith or harassment motivates the [discoveror's] action, the court should not intervene to limit the scope of pretrial discovery." Travis Meat, etc., Co. v. Ashworth, supra, 127 Ga. App. at 288-89, 193 S.W.2d 166.

We will not burden this opinion with a lengthy factual analysis of plaintiffs' request for production. In view of the standards set forth above, suffice it to say that we have reviewed said request in light of defendant's objections thereto and find no abuse of discretion in the trial court's overruling same. Cf. E.H. Siler Realty, etc., v. Sanderlin, 158 Ga. App. 796 (2), 282 S.E.2d 381 (1981), wherein a request for "all documents" intended for use as evidence at the trial of the case was found to be outside the permissible scope of discovery, but a

request for "all documents" relied upon to demonstrate and support facts relevant to the litigation would be within the permissible scope (sic) discovery; Bullard v. Ewing, 158 Ga. App. 287, 279 S.Ed.2d 737 (1981), wherein a request for the name, address and telephone number of every individual, corporation or company for whom the defendant performed construction or building repair work since 1975 was found to be unreasonably broad and too general. See generally Vaughn & Co. v. Saul, 143 Ga. App. 74(4), 237 S.Ed.2d 622 (1977).

3. Defendant's second and forth enumerations challenge the imposition of sanctions adjudicating liability in this case as not relating to the issues made by the request for production. Pursuant to OCGA § 9-11-37 (b)(2)(A, B, C) the trial court imposed

the following sanctions: "1. The following facts, matters and conditions are established as true for purposes of [these lawsuits]: (a) That Defendant Carey Canada, Inc. did sell asbestos containing products; (b) That Plaintiffs were exposed to the asbestos containing products sold by Defendant Carey Canada, Inc.; (c) That Plaintiffs have suffered personal injury and/or death as a result of being exposed to the asbestos containing products sold by Defendant Carey Canada, Inc.; (d) That the Defendant Carey Canada, Inc., failed to warn the Plaintiffs and each of them of the dangerous characteristics of their asbestos-containing products and is, therefore, guilty of negligence as a matter of law; (e) That the Defendant Carey Canada, Inc., knowingly suppressed and covered up knowledge of the dangers

of asbestos in order to maximize corporate profits in complete and utter disregard of the adverse health effects upon persons exposed to asbestos products manufactured and sold by Defendant Carey Canada, Inc.; 2. That Defendant Carey Canada, Inc. is prohibited from submitting or offering any evidence or testimony to contradict any facts alleged by Plaintiffs or to support any defense alleged by Defendant Carey Canada on any issues of liability."

The question here is not whether this court as an original matter would have applied these sanctions; it is whether the trial court abused its discretion in so doing. Insurance Corp. of Ire. v. Compagnie Des Bauxites de Guinea, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982); see Dean v. Gainesville Stone Co., 120 Ga.

App. 315, 170 S.Ed.2d 348 (1969). OCGA § 9-11-37(b)(2) "contains two standards--one general and one specific--that limit a [trial] court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." Ins. Corp. of Ire., supra, 456 U.S. at 707, 102 S.Ct. at 2106. See Agnor, Use of Discovery Under the Ga. Civil Practice Act (3rd ed.), §12-6.

As to the "justice" of the sanctions imposed, the trial court in its order noted that plaintiffs filed their request for production of documents on December 21, 1982. The court found that "[e]very effort by this Court to effect discovery without any order to compel was made by this Court only to meet (sic) with a direct refusal to discovery. Following the

futile efforts of this Court to effect discovery voluntarily by said Defendant Carey Canada this Court ordered the production of the documents in its Order of November 16, 1983. Defendant Carey Canada to date [December 31, 1984] has failed to produce the documents ordered by this Court. . . As to the production of documents, in every hearing held by this Court prior to the order compelling discovery defendant steadfastly refused to produce any documents requested under the claim that the documents were (1) in Canada and (2) the Canadian laws prohibited disclosure of such records. An interesting event occurred in Chatham County in the Hall of Justice in the Federal District Court, Southern District, Savannah Division prior to this Court issuing its orders to compel on November 16, 1983. A disclosure was made

to the Federal Judge presiding in the asbestos cases pending for trial in that forum, that Defendant Carey Canada possessed relevant documents to the asbestos litigation in the State of Florida, U.S.A. The Defendant Carey Canada did not disclose this information to the Court nor has the Defendant to this date disclosed to this Court that such documents exist.

"[T]his Court after notice and hearing to all parties heard Plaintiffs' Motion for Sanctions against said Defendant Carey Canada for failing to produce the documents requested. The hearing of the sanctions was held after all decisions were rendered by the Appellate Courts of this State. Based upon the record of these asbestosis (sic) cases, based upon the efforts of the presiding Judge in these cases to

effectuate meaningful discovery without orders compelling discovery, based upon Defendant Carey Canada's refusal to [provide] discovery until ordered to discover by this Court not only as to the production of documents but also as to the other methods of discovery initiated by Plaintiffs, the Court can arrive at no other finding but that the Defendant Carey Canada, willfully and intentionally refused to discover prior to and subsequent to the order of this Court compelling discovery. The Defendant has failed to comply with the Order of this Court to produce the documents ordered to be produced. The refusal to produce the documents by Defendant Carey Canada was and is a continuing willful and intentional evasion of the discovery process as well as the orders of this Court. Defendant has totally abused the

discovery process provided under the Laws of Georgia." These factors amply demonstrate the "justice" of the trial court's order. Accord Ins. Corp. of Ire., supra at 707-08, 102 S.Ct. at 2106-07. See Swindell v. Swindell, 233 Ga. 854(3), 213 S.E.2d 697 (1975); Rubin v. Cindyreal, 171 Ga. App. 45, 318 S.Ed.2d 520 (1984).

As to the second standard--that the sanction must be specifically related to the particular claim which was at issue in the order to provide discovery--only two of the sanctions imposed give us pause, numbers 1(c) and 2. The remaining sanctions are clearly related to the claims at issue. As to sanction 1(c)--that plaintiffs have suffered personal injury and/or death as a result of being exposed to the asbestos containing products sold by defendant--

plaintiffs concede that this finding does not correlate with any of documents requested. This sanction therefore does not support "'the presumption that the refusal to produce evidence. . . was but an admission of the want of merit in the asserted defense.' Hammond Packing [Co. v. Ark., 212 U.S. 322, 351 (29 SC 370 [380], 53 LE 530) (1909)]." Ins. Corp. of Ire., supra, 456 U.S. at 709, 102 S.Ct. at 2107. It follows that sanction number 2--prohibiting defendant from contesting any issue of liability--is likewise beyond the scope of the discovery requested. Sanctions 1(a),(b), (d) and (e) are affirmed; sanction 1(c) is reversed. To the extent sanction 2 relates to sanctions 1(a),(b),(d) and (e), it is affirmed; to the extent it purports to go further, it is reversed.

4. Defendant's third and fifth enumerations of error assert that the trial court exceeded its powers by imposing a fine of $500 per day for failure to comply with the order compelling production of documents. The trial court imposed the following fine for contempt of court: "Under O.C.G.A. 9-11-37(b)(2)(D) in addition to the other sanctions issued herein the Court finds the said Defendant Carey Canada in willful contempt of this Court for each day it has failed to comply with the order of this Court requiring it to produce records to the Plaintiffs, which Defendant knowingly had in its control and custody in the United States of America. Under [O.C.G.A. 15-7-4(5)] the Court fines said Defendant Carey Canada the sum of $500.00 for each day commencing and including December 9,

1983, and each day thereafter as a continuing contempt to the date of this order. And upon failure of said Defendant Carey Canada to comply with said Order of November 16, 1983, upon notice and hearing the Court shall consider further fines. The Defendant, Carey Canada, may produce said records and purge itself of further fines for non compliance with the orders of this Court."

OCGA § 15-7-4(5) limits the jurisdiction of state courts to "[t]he punishment of contempts by fine not exceeding $500.00 or by imprisonment not exceeding 20 days, or both. . ." Defendant contends that the citation for contempt in this case is criminal in nature, rather than civil, in that the record shows but one violation of the discovery order, regardless of the number of days the violation continues.

Defendant thus asserts that the trial court's authority to punish therefor is limited to a one-time imposition of the sanctions provided in the statute. In other words, the thrust of defendant's argument is that the trial court exceeded its jurisdiction in treating each day of defendant's violation of the order compelling discovery as a separate contempt for the purpose of imposing sanctions.

"Proceedings for contempt are of two classes, punitive [criminal] and remedial [civil]. A proceeding of the former class is intended to punish the offender for a past act of omission or commission which has disturbed the regular proceedings of the court, interfered with its proper functioning, resisted its authority, or reflected contempt upon it, and the authorized

penalty in such a case is that prescribed by [statute]; the latter or remedial proceeding is instituted to preserve and enforce the rights of private parties, and may be resorted to as a means of compelling obedience to such court orders or duties as the offenders may wilfully or fraudulently fail or refuse to perform; and in such cases of continuing contempt it is within the power of competent courts to imprison the refractory party until he shall have obeyed the precept. [Cits.]" Hancock v. Kennedy, 22 Ga. App. 144(1), 95 S.E. 735 (1918); Davis v. Davis, 138 Ga. 8(1), 74 S.E.830 (1912). As a practical matter a corporation may not be imprisoned, but it may be fined. State v. Shepherd Constr. Co., 248 Ga. 1, 5, 281 S.E.2d 151, cert. den., 454 U.S. 1055, 102 S.Ct. 601, 70 L.Ed.2d 591 (1981). It follows that

where imprisonment cannot be utilized, a per diem fine may be imposed, within statutory limits, until the recalcitrant party performs the decree of the court. 17 C.J.S. Contempt §98. See Kenimer v. State of Ga., 81 Ga. App. 437(6), 59 S.E.2d 296 (1950). See also In re Pruitt, 249 Ga. 190, 193, 288 S.E.2d 208 (1982). Thus, whether or not a fine or imprisonment is imposed is not a distinguishing test for determining to which class a contempt proceeding belongs. 17 C.J.S. Contempt §5(2).

"In all contempts, it is true, there is an element of criminality, involving as they do the willful disobedience of orders or decrees made in the administration of justice, but a contempt proceeding is not always a criminal proceeding." Drakeford v. Adams, 98 Ga. 722, 724, 25 S.E. 833 (1896). "Generally

the classification as to 'civil' or 'criminal' contempt is one depending on the facts of each case." City of Macon v. Massey, 214 Ga. 589, 590, 106 S.Ed.2d 23 (1958). "'A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised.'" Ensley v. Ensley, 239 Ga. 860, 861, 238 S.Ed.2d 920 (1977). "[A] contempt is considered civil when the punishment is wholly remedial, serves only the purposes of complainant, and is not intended chiefly as a deterrent to offenses against the public. The polar concepts are 'punitive' versus 'remedial.'" 17 C.J.S. Contempt § 5(2), at p. 13.

Applying the foregoing legal precepts to the facts in this case, we are persuaded that the contempt charged and adjudicated was not criminal, but

civil. In levying the fine the trial court was not acting sua sponte or at the instance of the government through a prosecuting officer; rather, it lent a helping hand to a civil litigant, a suppliant for aid. Compelling discovery to an obstructed litigant, not vindication of the public justice, was the apparent purpose of the fine, and of the fine in all its parts. What is plain from the trial court's contempt order is the fact that the assessment was made in a genuine endeavor to coerce defendant into providing the discovery ordered without any further obstruction and delay. See, e.g., Fox v. Capital Co., 299 U.S. 105, 108-09, 57 S.Ct. 57, 59, 81 L.Ed. 67 (1936). Moreover, the trial court treated the violation of the order compelling discovery as a continuing contempt which defendant had the power to

rectify, rather than a single, completed act of contempt. Compare Warner v. Martin, 124 Ga. 387 (4), 52 S.E. 446, 4 Am. Ann. Cas. 180 (1905). Under these circumstances, OCGA § 15-7-4(5) provides no basis for reversal of the judgment entered. Cf. Hancock v. Kennedy, supra, 22 Ga. App. 144 at (2), 95 S.E. 735.

5. The fine imposed by the trial court totals $193,500. Defendant's sixth enumeration of error asserts that the punishment imposed constitutes cruel and unusual punishment under federal and state constitutional provisions.[2] The action of a trial court in punishing a party for contempt will not be controlled

2. Defendant's argument in these appeals makes no distinction between the state and federal constitutional provisions cited. Accordingly, for our purposes here, we need not address any substantive differences (if, indeed, there are any) between them.

absent an abuse of discretion. Howard v. Durand, 36 Ga. 346 (2), 91 Am. Dec. 767 (1867). "The punishment can not be cruel, unusual, or excessive, but must be reasonable in view of the particular facts and circumstances." Brooks v. Sturdivant, 177 Ga. 514, 516, 170 S.E. 369 (1933). Where the purpose of a fine is to compel compliance with the court's order, the court must consider "the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired. It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a . . . means of securing future compliance, consider the amount of defendant's financial resources and the

consequent seriousness of the burden to that particular defendant." United States v. United Mine Workers of America, 330 U.S. 258, 304, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947).

In light of the foregoing principles, we think the record clearly warrants the fine imposed. According to its own advertisement, defendant is an international corporation which is "one of the world's largest producers of asbestos fibre." It is doubtful that a nominal fine would prove effective in ending defendant's continuing contumacy, particularly in light of the history of this case which provides a factual predicate for the trial court's finding of "willful" contempt. Moreover, there is no evidence that defendant is unable to pay the fine or that the assessment is unduly burdensome. We agree with

defendant that the fine imposed is substantial, but we find no basis in the record for concluding that this constitutes cruel and unusual punishment.

The holdings in Kenimer v. State of Ga., 83 Ga. App. 264, 63 S.E.2d 280 (1951), and its prior appearance, 81 Ga. App. 437 (7), supra, do not require a result different from that reached here. Those cases, involving criminal contempt, are limited to the facts therein stated. Curtis v. State, 102 Ga. App. 790, 799-800, 118 S.Ed.2d 264 (1960). Moreover, "'where the [punishment] imposed by the trial court is within the limit fixed by the statute, it will not be set aside. . . on the ground that the sentence imposed is excessive and the punishment cruel and unusual, and, therefore, in violation of the Constitution of this State. . .'" Id. at

800, 118 S.E.2d 264. As is apparent from our holding in Division 4, supra, the fine imposed in this case is within statutory limits, and thus, is not violative of state constitutional provisions.

Nor are we persuaded by defendant's contention that the fine here is disproportionate to the offense. Defendant argues that as a Canadian corporation subject to the laws of Canada, it justifiably declined to produce the requested documents because to do so would place it in violation of Canadian law. However, the fine imposed here related solely to documents located in the United States and thus not subject to Canadian law. The holding in Societe Internationale, etc., v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L.Ed.2d 1255 (1958), is thus inapposite to the case at bar.

6. Defendant's seventh enumeration of error asserts that OCGA § 15-7-4(5) is unconstitutional as authorizing cruel and unusual punishment. Appellate jurisdiction of questions concerning the constitutionality of state statutes rests exclusively in the Supreme Court. These cases were originally filed in the Supreme Court but were transferred to this court by order finding that this enumeration of error and enumeration of error 14 "deal with the trial court's application of the statutes involved, not their constitutionality." This court thus has jurisdiction over the question raised by this enumeration. However, in light of our holding in Division 5, supra, this enumeration of error provides no basis for reversal.

7. Enumerations of error 9, 10 and 11 are argued together, defendant

contending that the order of contempt and sanctions violates due process, is an abuse of discretion, is contrary to law and violates international law. Responding seriatim to each issue raised here, we first find no factual predicate of record which supports defendant's due process argument. See generally Schiselman v. Trust Co. Bank, 246 Ga. 274(2), 271 S.E.2d 183 (1980). As noted in Division 5, supra, the trial court's order did not punish defendant for its refusal to violate the Quebec Business Concerns Records Act. We find entirely without merit defendant's assertions that the trial court abused its discretion in these cases and that the judgment is contrary to law. See Crute v. Crute, 86 Ga. App. 96, 70 S.E.2d 727 (1952). See generally Warehouse Carpet Sales, etc., v. S.C.J. Assoc., 170 Ga. 352(2), 317 S.E.2d

328 (1984); Carter v. Data Gen. Corp., 162 Ga. App. 379 (3), 291 S.E.2d 99 (1982). Finally, we find no issue of international law presented by the facts of this case. In any event, defendant's assertion that it had no intent to violate the discovery order was not binding on the trial court. See Schiselman v. Trust Co. Bank, 246 Ga. 274(1), 271 S.E.2d 183, supra.

8. Defendant's sixteenth enumeration of error asserts that the trial court improperly considered and relied upon "pleadings and proceedings in other cases in other courts which were not properly made a part of the record in this case." However, defendant's brief contains neither argument nor citation of authority in support of this enumeration. Therefore, under Court of Appeals Rule 15(c)(2) this enumeration of error is

deemed abandoned. Plaintiff's attempt to resurrect this enumeration by addressing its merits in a supplemental brief is of no avail. Wade v. Thomasville Orthopedic Clinic, 167 Ga. App. 278(3), 306 S.E.2d 366 (1983).

9. We have reviewed defendant's remaining enumerations of error and, in light of our holdings in the foregoing divisions of this opinion, find them to be entirely without merit.

Judgments affirmed in part; reversed in part.

McMURRAY and BIRDSONG, P.JJ., and SOGNIER and BENHAM, JJ., concur.

BANKE, C.J., DEEN, P.J., and CARLEY and BEASLEY, JJ., dissent.

CARLEY, Judge, concurring in part and dissenting in part.

I concur fully in all divisions of the majority opinion with the exception

of Divisions 4, 5 and 6. As to Division 4, I must respectfully dissent to the majority's holding that the trial court's order is an adjudication of appellant's civil contempt.

"Attachments for contempt are either civil or criminal, or both." (Emphasis supplied.) Beavers v. Beavers, 148 Ga. 506(2), 97 S.E. 65 (1918). "An injured party is frequently more interested in obtaining a contempt order as a remedy for himself or herself (civil contempt) than in obtaining punishment of the defendant for violating the court's order (criminal contempt). [Cit.] The court on the other hand has the responsibility of seeing that its orders in other cases as well as the pending cases are obeyed. Hence a court may find that a contempt proceeding originated and pursued by a party seeking civil contempt should be

treated as one for criminal contempt." (Emphasis supplied). Schiselman v. Trust Co. Bank, 246 Ga. 274, 277, 271 S.E.2d 183 (1980). Criminal contempt is retrospective. It authorizes unconditional punishment based upon a past violation of a court's prior order and vindicates the authority of the order itself. Civil contempt is prospective. It authorizes conditional punishment as a means to coerce future compliance with a court's prior order and seeks to provide a party with the relief to which he is otherwise entitled under that prior order. "Criminal contempt with unconditional [punishment] may be used to preserve the court's authority and to punish disobedience of its orders. [Cit.] Civil contempt, on the other hand, is conditional punishment which coerces the contemnor to comply with the court order.

[Cit.]" Hopkins v. Hopkins, 244 Ga. 66, 67 (1), 257 S.E.2d 900 (1979).

Although the contempt order in the instant cases arises in the context of a civil action and as the result of appellee's motion for sanctions, it is clear that, insofar as appellant was adjudged to have been in "continuing contempt to the date of [the] order," the trial court's intent was to punish appellant. (Emphasis supplied). The order recites that appellant was being found in contempt for its past failure "to comply with the order of [the] Court requiring it to produce records to the [appellees]. . ." The order imposes an unconditional penalty for this prior failure to comply with the trial court's order. The only remedial aspect of the trial court's contempt order ostensibly designed to coerce appellant into future

compliance with the prior discovery order is the recitation that, "upon failure of [appellant] to comply with said Order of November 16, 1983, upon notice and hearing the Court shall consider further fines. [Appellant] may produce said records and purge itself of further fines for non compliance with the orders of this Court." (Emphasis supplied.) Accordingly, I believe that the $500 per day fine "to the date of [the] order" was clearly punishment for appellant's past violation of the trial court's discovery order and was, therefore, an adjudication of criminal, not civil, contempt.

"The power of the courts of this State to punish for contempt is limited by law, and any sentence exceeding the limitation thus imposed is void." Drane v. Childers, 18 Ga. App. 282 (1), 89 S.E. 304 (1916). OCGA § 15-7-4(5) provides

that courts have jurisdiction over "[t]he punishment of contempts by fine not exceeding $500.00. . . " This statutory limitation does not apply when the adjudication of contempt is civil and remedial, for such contempt is potentially continuous until such undeterminable time as the contemnor purges himself by future compliance with the trial court's prior order. See Cobb v. Black, 34 Ga. 162, 166(2) (1865). This concept of a "continuing contempt" exception to the statutory limitation of OCGA § 15-7-4(5) does not, however, apply to past criminal contempt evidenced by the contemnor's prior continuing failure to obey a trial court's order. Cobb v. Black, supra at 162(2). "In the case now under review, the contempt for which the fines were imposed had been committed by doing an act or acts which the judge

decided to be in violation of [its prior discovery] order, and therefore came directly within the scope of the legislative provision limiting the power of . . . courts in imposing fines for contempt." Warner v. Martin, 124 Ga. 387, 393, 52 S.E. 446 (1905). "The object [of the fines], in this case, [was] to punish for an act done, in contempt of the Court, [not] to compel the doing of an act necessary to the administration of justice." (Emphasis in original.) Cobb v. Black, supra at 167. Accordingly, I would find that any fines imposed upon appellant in excess of $500 for its past criminal contempt in refusing to comply with the trial court's discovery order was unauthorized under OCGA § 15-7-4(5).

For the above-stated reasons, it is my opinion that the trial court

adjudicated appellant in criminal contempt and erroneously imposed a fine in excess of $500. Therefore, I would affirm the trial court's contempt order only upon condition that the fines in excess of $500 be stricken. Accordingly, I must respectfully dissent to Division 4 of the majority opinion which affirms in full the contempt order.

I am authorized to state that Chief Judge BANKE, Presiding Judge DEEN and Judge Beasley join in this dissent.

(2) Decision of Supreme Court of Georgia

Carey Canada, Inc. v. Hinely, et al, No. 44246, 257 Ga. 150, 356 S.E.2d 202 (1987)

MARSHALL, Chief Justice.

This case, Carey Canada, Inc. v. Hinely, 181 Ga. App. 364, 352 S.E.2d 398 (1986), is here on certiorari. The question for decision is whether the trial court, which is the State Court of Chatham County, by imposing a fine against the appellant in the amount of $500 per day for past violations of a court order compelling discovery, exceeded a jurisdictional limitation imposed on State Courts under OCGA § 15-7-4(5). For reasons which follow, we conclude that it did.

[1] This is a products-liability action against the appellant, which

produces asbestos and goods containing asbestos. The trial court ordered the appellant to comply with the appellees' request for production of documents. The appellant refused to comply with this order compelling discovery; and the appellees filed a motion for the imposition of sanctions under OCGA § 9-11-37(b)(2)(D), which authorizes a court to treat as contempt of court the failure of a party to obey an order compelling discovery. The trial court entered an order imposing a fine against the appellant in the amount of $500 per day for violations of the discovery order up to the date of the contempt order, and the contempt order stated that the appellant could produce the requested records and purge itself of further fines. OCGA §15-7-4(5), supra, vests State Courts with jurisdiction to punish

"contempts by fine not exceeding $500 or by imprisonment not exceeding 20 days, or both." Cobb v. Black, 34 Ga. 162(2) (1865), constitutes authority for the proposition tht the foregoing statutory limitation on the power of State Courts to punish for contempt applies to criminal contempt but not civil contempt. The distinction between the two is that criminal contempt imposes unconsitional punishment for prior acts of contumacy, whereas civil contempt imposes conditional punishment as a means of coercing future compliance with a prior court order. Hopkins v. Hopkins, 244 Ga. 66(1), 257 S.E.2d 900 (1979).

[2] In this case, a 5-4 majority of the Court of Appeals affirmed the contempt order, holding that the fines imposed did not exceed the State Court's jurisdiction under §15-7-4(5), supra, in that "the

contempt charged and adjudicated was not criminal, but civil." 181 Ga. App. at p. 371(4), 352 S.E.2d 398. We agree with Judge Carley's dissenting opinion, which concludes that the imposition of a $500 fine per day for past violations of the court's discovery order was an adjudication of criminal contempt, and, therefore, the contempt order should be affirmed on condition that the fines in excess of $500 be stricken.

The judgment of the Court of Appeals is therefore reversed, and the contempt order is affirmed on condition that the fines in excess of $500 be stricken.

Judgment reversed.

All the Justices concur.

(3) Plaintiff's Requests For Production

(CAPTION OMITTED)

REQUEST TO PRODUCE DIRECTED TO DEFENDANT, CAREY CANADA, INC.

COME NOW the Plaintiffs, by and through their undersigned counsel, and request that the Defendant, Carey Canada, Inc., produce the following documents and records on February 8, 1983, at 9:00 A.M. at Carey Canada, Inc., East Brought Station, Quebec, Canada, and continue to make those documents available for inspection and copying until August 11, 1983.

1. Any and all documents or records of whatever type which indicate the manner, method, and/or system which is used or has been used by Carey Canada, Inc., and/or Carey Canadian Mines, LTD., for filing and/or retrieving information concerning the sale, distribution and/or

shipment of asbestos or asbestos-containing products by Carey Canada, Inc. and/or Carey Canadian Mines, LTD.

2. Any and all lists, documents or records of whatever type which indicate the names and/or addresses of any person or company located in Georgia which has purchased asbestos or asbestos-containing products from Carey Canada, Inc. or Carey Canadian Mines, LTD.

3. Any and all lists, documents or records of whatever type which indicate the names of any person or company which has purchased asbestos or asbestos-containing products from Carey Canada, Inc. or Carey Canadian Mines, LTD., after July, 1970.

4. Any and all lists, documents or records of whatever type which indicate the names of persons or companies in Georgia to whom Carey Canada, Inc. and/or

Carey Canadian Mines, LTD., has mailed product and/or information concerning the availability of asbestos or asbestos-containing products.

5. Any and all documents, lists, ledgers, journals and/or records of whatever type which reflect any of the following:

(a) The identify (sic) of any person or company located in Georgia which has made payment to Carey Canada, Inc. or Carey Canadian Mines, LTD., for asbestos or asbestos-containing products;

(b) The amount of payment made by such person or company;

(c) The product for which payment was made by such person or company;

(d) The quantity of each product for which payment was made by such person.

6. Any and all documents, correspondence, or records of any type which reflect any of the following:

(a) Orders or request to purchase asbestos or asbestos- containing products from Carey Canada, Inc. or Carey Canadian Mines, LTD., by a person or company located in Georgia;

(b) The date any such order or request to purchase was received by Carey Canada, Inc., or Carey Canadian Mines, LTD.;

(c) The identity of the person or company from whom such order or request to purchase was received;

(d) The address of persons or companies from whom any such order or request to purchase was received;

(e) The products each person or company ordered or requested to purchase;

(f) The quantity of any product any such person or company ordered or requested to purchase.

7. Any and all documents, lists, correspondence or records of whatever type which reflect any of the following:

(a) The identity of any person or company located in Georgia to whom Carey Canada, Inc., or Carey Canadian Mines, LTD., has shipped asbestos or asbestos-containing products;

(b) The address of any such company or person;

(c) The date of any such shipment;

(d) For each such shipment, the name of the products shipped;

(e) For each such shipment, the quantity of the products shipped.

8. Any and all documents, lists, correspondence or records of whatever type which reflect any of the following:

(a) The identity of any person or company to whom Carey Canada, Inc. or Carey Canadian Mines, LTD., has shipped asbestos or asbestos-containing products after July, 1970;

(b) The address of any such company or person;

(c) The date of any such shipment;

(d) For each such shipment, the name of the products shipped;

(e) For each such shipment, the quantity of the products shipped.

9. Any and all invoices concerning the sale, distribution or shipment of asbestos or asbestos-containing products by Carey Canada, Inc., or Carey Canadian Mines, LTD., to a person or company in Georgia.

10. Any and all invoices concerning the sale, distribution or

shipment of asbestos or an asbestos-containing products (sic) by Carey Canada, Inc. or Carey Canadian Mines, LTD., after July, 1970.

11. Any and all documents, vouchers, or records of whatever type which reflect travel expenses incurred by Carey Canada, Inc., or Carey Canadian Mines, LTD., or their employees in Georgia or if Carey Canada, Inc. cannot segregate the documents, vouchers or records concerning travel expenses incurred in Georgia, then, produce all such records without regard to whether the expense was incurred in Georgia. This request includes, but is not limited to, the following:

(a) Records concerning expenses incurred for lodging;

(b) Records concerning where and by whom expenses were incurred for the rental of automobiles.

12. Any and all records concerning expenses incurred by Carey Canada, Inc., or Carey Canadian Mines, LTD., or its employees or stockholders for commercial air travel to or from Georgia or, if Carey Canada, Inc. cannot segregate air travel to and from Georgia, then, provide all records concerning expenses for commercial air travel without regard to origination or destination.

13. Any and all documents concerning flights to and from Georgia by any aircraft owned, operated or leased by Carey Canada, Inc., or Carey Canadian Mines, LTD., or if Carey Canada, Inc. cannot segregate the records concerning the flights to and from Georgia, then produce all records concerning origination and destination of any aircraft owned, operated or leased by Carey Canada, Inc., or Carey Canadian Mines, LTD.

14. Any and all documents, correspondence, or records of whatever kind, concerning Carey Canadian Mines., LTD., or Carey Canada, Inc.'s, participation in or presence at any meeting, convention, trade show or gathering of any type in Georgia.

15. Any and all directories which have been maintained by Carey Canada, Inc. or Carey Canadian Mines, LTD.

16. Any employee list maintained by Carey Canada, Inc. or Carey Canadian Mines, LTD., which indicates the address of those company's employees.

17. Any and all records, bills, or documents of whatever kind, which reflect long distance telephone charges to or from Georgia which were paid by Carey Canada, Inc., or Carey Canadian Mines, LTD., or if Carey Canada, Inc. cannot segregate Georgia long distance charges,

produce all records reflecting all long distance telephone charges paid by Carey Canada, Inc., or Carey Canadian Mines, LTD., without regard to whether they were to or from Georgia.

18. Any and all records or documents of whatever type concerning advertisements placed by Carey Canada, Inc. or Carey Canadian Mines, LTD., in any publication.

/s/ Richard H. Middleton, Jr.
Richard H. Middleton, Jr.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for Certiorari upon Mr. Richard Middleton, Middleton and Anderson, Attorneys for Respondents, Post Office Box 10006, Savannah, Georgia 31412, by certified mail, return receipt requested, duly addressed and postage prepaid.

This ____ day of _____, 1987.

_____
Attorney for Petitioner